No. 16-1140

In the Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, DBA NIFLA, ET AL., PETITIONERS

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONERS

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] lives in California and is not overly happy to see his own State force pro-life pregnancy clinics to advertise abortion services. However, he sees little reason to exempt the clinics from having to admit whether they are licensed medical providers or not. So, presenting a relatively "balanced" point of view which may help the Court, he submits this brief. (However, seeing the odiousness of compelled referral of abortion services by anti-abortion persons, which issue may be more important than the "unlicensed medical provider disclosure" issue, this brief supports Petitioners, even if Amicus disagrees with some of their ideas.)

Incidentally, Amicus is not much going to address the minutiae of "levels of scrutiny" or "professional speech" here, but shall just briefly note that the "professional speech" issue could be handled various ways; e.g., even if the Court does not formally approve a "professional speech" category, the Court could, say, note that in professional situations, it is usually easier to ascribe a compelling state interest, and/or narrow tailoring, to whatever strictures the State places on speech.

SUMMARY OF ARGUMENT

It appears rather outrageous for California to make pro-life pregnancy clinics distribute anti-life

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[1] No party or its counsel wrote or helped write this brief, or gave money for the brief, *see* S. Ct. R. 37. Blanket permission by Petitioners to write briefs is filed with the Court, and all Respondents have e-mailed Amicus letters of permission.

information or referrals, especially when the State could disseminate such things itself.

Nevertheless, the Court should not "overcompensate" by *per se* banning all viewpoint discrimination, since some unusual circumstance might come up requiring somesuch temporary "discrimination" to prevent disaster, e.g., in circumstances related to "fighting words" or "shouting 'Fire' in a crowded theater".

And mandatory disclosures re pro-life clinics' being unlicensed as medical facilities, or not having licensed medical providers, are good things, since women have a right to know.

There are useful comparisons to make with the "gay wedding cake" case, *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, No. 16-111, 370 P.3d 272 (Colo. App. 2015), *cert. granted* (U.S. June 26, 2017), re the need for mandatory disclosures by businesses or other institutions to clients or potential clients.

The State could amend current law, or make new laws, to mandate, instead of abortion referral, clinics offering referrals for measures purely for promoting the life and health of the unborn and mothers. Petitioners and Respondents could even cooperate on this issue.

In this troubled age, the spirit of Martin Luther King may be of inspiration to the Court in finding the good on both sides in the instant case.

ARGUMENT

I. Commandeering Anti-Abortion Clinics

to Advertise Abortion Services Is of Questionable Legitimacy

Amicus is not going to repeat all the various cogent arguments already made by other people against California's using the Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act (2015 Cal. Stats. ch. 700, codified at Cal. Health & Safety Code §§ 123470 et seq.) to make pro-life pregnancy clinics post information about access to abortion. That Act, *supra*, has some fine aspirations in its full name ("accountability", etc.), but one Orwellian aspect of the Act is that, *pace* the full name of the Act, there is not much "freedom" for the clinics, who are obliged, under pain of punishment, to post the word "abortion", along with a phone number for clinic visitors to access abortion services.

This kind of coercion is unseemly. If one may reference our popular culture, in particular, the currently-in-theaters *Star Wars Episode VIII — The Last Jedi* (Walt Disney Studios Mot. Pictures 2017): pro-life clinics may feel somewhat like the Act is forcing them to give the phone number to the Death Star, a large device which brutally kills innocent people, which is what the clinics feel abortion does to preborn infants. (Oddly enough, the film, *see id.*, does feature a sort of "crank call" from Rebel fighter Poe to fascistic enemy general Hux; but it was a *voluntary* phone call, not a State-mandated one.) In addition, the film's main female protagonist, Rey, is an individual who tends to do what she wants and follow her conscience against opposition, *see id.*; this is in line with our American ethos of freedom, and

thus in favor of Petitioners, who don't want to be the puppet of the State and recite information which promotes abortion access.

Amicus is tempted to ask, is the State of California aware that the clinics are *pro-life* clinics? Is it even good manners to do something so innately offensive as commandeering, even hijacking, humanitarian institutions to spread a message they despise, a message of death by abortion instead of life for the unborn? *See, e.g.*, David Boyle, *Religious (or Non-Religious) Hypocrisy and the Contraceptive, Cake, & "Pro-Life Clinic" Cases, Among Others*, Casetext, Dec. 25, 2017, https://casetext.com/posts/religious-or-non-religious-hypocrisy-and-the-contraceptive-cake-pro-life-clinic-cases-among-others-2, noting that "it [is] bewildering that the State would force *anti*-abortion facilities to post, effectively, advertisements for abortion. This sounds not completely unlike mandating that Native American history museums post ads for a 'Let's Create Another Painful Trail of Tears for the Cherokees Right Now Action Fund'." *Id.*

Too, even contraceptives which the clinics feel may have abortifacient properties, should not have to be advertised, or given referrals to, by the clinics.

Thus, it would not be enough for the Court merely to let the clinics have the right to omit the words "abortion" or "contraception" from the required notices. Even if those offending words and concepts are gone from the notices, the required phone number the clinics must post under the Act still leads to the services the clinics find morally offensive. So the clinics should be exempted from having to post the phone number, period.

After all, the State can just advertise those sorts of services themselves. instead of making the clinics do it. The State has a right to regulate medical clinics, but there are limits. Not just the First Amendment, but also common sense and good taste, militate against letting the Act force the pro-life clinics to provide information abetting abortion access.

However, common sense may provide limits on some of Petitioners' proposals as well.

II. A *Per Se*, Unconditional Prohibition on Viewpoint Discrimination Could Throw Out the Baby with the Bathwater

Petitioners, while legitimately concerned about free-speech issues, set out in their merits brief, *id.* at 57, Section III-C, the shocking proposition, "The Court should adopt a per se rule that viewpoint discrimination against private speech is unconstitutional." This may be well-meant but is overenthusiastic.

True, there should be very few instances in which the State should interfere with individuals' private viewpoints. Free speech and thought are the American way. But, from an abundance of caution, the Court should not make the foolish error of assuming that it is *always and everywhere* an *automatic* violation of the First Amendment to "discriminate against" people for expressing a viewpoint.

Sometimes, if extremely rarely, there may be an exigent public need which allows no other practical solution at the time than "viewpoint discrimination".

Naturally, when the need is over, the State should cease its prosecution of a citizen for his or her expression of a viewpoint, no matter how odious or ugly that viewpoint might be to most people.

Even if Petitioners claimed that other categories such as "fighting words", etc., are easily differentiable from "viewpoint discrimination", are they? These days, things are so strange that *Matal v. Tam*, 582 U.S. ___ (2017), allows people to do something as vile as trademarking racial or sexual slurs for profit, it would seem. So, what gets counted as "free speech" is becoming somewhat fluid these days.

Hence, for example, the "fighting words" doctrine could be overturned if there can never be any "viewpoint discrimination". Amicus has always wondered about the "fighting words" doctrine: "damned fascist/racketeer" sounds a little tame these days, *pace Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Still, there might be "fighting words" in some circumstances, and if someone argues that he always has a right to the "viewpoint" of calling someone any kind of insult at any time without being suppressed by the State, even in circumstances that could likely cause a deadly riot, then there might be no more "fighting words" doctrine, or at least not much of an effective one.

Moreover, if someone either yells "Fire!" in a crowded theater, or offers a more elaborate version, "If there's a fire over where the screen's glowing red, you sons of b's should RUN LIKE THE WIND OUT OF THIS THEATER RIGHT NOW!!!": both of those could be considered "viewpoints", and the second

one, with the disclaimer "if", might not even be fraudulent, technically speaking. But either formulation could incite gullible people to stampede out of the theater and get trampled to death. Hence, Amicus believes the State (including the Federal "State") may very much disfavor and even punish such a private incitement to dangerous behavior (fleeing headlong from a crowded theater without need to do so), instead of coddling it the way that Petitioners' desired "ban on viewpoint discrimination" might allow.

That theater scenario *supra* would be an "abortion", indeed: a bunch of innocent theatergoers trampling each other to death, and with Joe Prankster being immune from prosecution (if Petitioners' theories are taken to their logical endpoint) for the government "discriminating" against his "private viewpoint" that people should flee from the theater, or that he claimed to think there was a fire. But he should not be immune from prosecution, since if such pranksters are immune, then the rest of us are not safe in crowded theaters.

(And what if some deranged President tried to start a riot by saying to some foreign visitors, "You people come from s--thole countries, why don't you crawl back there?" in circumstances obviously ripe for a violent riot? Should the President be above the law and above arrest, despite his violent, or even careless-about-violence, intentions? Maybe not.)

Arguably, one form of really dangerous "viewpoint discrimination" in our age, if one is looking for such discrimination, is the "Muslim-immigration ban" the Trump Administration is foisting on the Nation. That is worth overturning (and, sadly, there are

plenty of self-labeled "Christian" groups who have not come out in favor of overturning that burden on religious freedom), but it is not worth it to make some paranoid decision to outlaw all "viewpoint discrimination" under all circumstances, even if it kills us. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963): "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." (Goldberg, J.)

And the present abortion-related case should not make the Court throw out the baby with the bathwater (so to speak) *vis-à-vis* viewpoint discrimination. Strict scrutiny (compelling state interest, least-restrictive means, etc.), and the Court's famed distaste for viewpoint discrimination, give quite enough protection for free speech already without adopting some absurdly rigid *per se* rule against viewpoint discrimination.

III. Unlicensed Clinics Have Little Reason to Complain about Having Publicly to State the Truth of Their Medically Unlicensed Status

Speaking of absurdity: while Petitioners are right to complain about forced referrals of abortion services, they are not right to complain about mandated common-sense disclosures re unlicensed clinics' being unlicensed as medical facilities or not having licensed medical providers. What is the problem with telling the truth here?

Indeed, a prime rationale for these clinics is to let women know what is going on. This may not legitimate forcing clinics to be billboards for State-recommended abortion services, but at the least, the

clinics should have the candor to say what they are, which facts the FACT Act justifiably makes them reveal. "Those who seek equity must do equity."

But Petitioners present a much darker picture of the State's motivations:

> [T]he Act's Compelled Disclaimer requir[es] a message in large font, and in multiple languages, potentially amounting to hundreds of words, that effectively obscures any other message.
>
> . . . .
>
> . . . the Act deters women from ever seeking *any* information from pro-life pregnancy centers in the first place.
>
> . . . .
>
> . . . [T]he Act . . . . interferes with the free exchange of ideas . . . .
>
> This, of course, is the State's goal in mandating messages in super-sized font to divert Petitioners' potential audience and inhibit Petitioners' opportunity to advocate for their pro-life perspective.

Pet'rs' Merits Br. at 27 n.12, 44, 45. But Petitioners protest too much. They make the State sound like devils, or close to that. To Amicus, such allegations about his residential State of California seem almost borderline-paranoid and highly unsupportable, maybe even slanderous. Maybe the State just wants clinic visitors not to be defrauded?

E.g., what if the anti-abortion clinic personnel "enthusiastically" make up some nonsense about abortion automatically causing breast cancer, or

suicidal tendencies? Frankly, some clinic personnel may have rationalized to themselves that it's okay to lie, or grossly exaggerate, if it may save a life, an unborn life, from abortion. But how far can the law protect such lies or exaggerations? Snake oil is a bad thing, even if the peddlers somehow mean well.

Moreover, once people are caught lying or exaggerating, might that not boomerang on the pro-life movement at some point? (Maybe it already has...) So, it actually does the clinics a favor of sorts, to remind them to state truthfully who they really are, which promotes the accountability of the clinics, per the "A" in the name of the FACT Act, *id.*

Women have a right to know what is going on. *See, e.g., The Last Jedi, supra* at 3, in which orphan Rey wants to find out, from Jedi Master Luke Skywalker or anyone else, what her parentage is, and also what is going on inside her with the Force.

In the real world, we may not have the Force, but real-life women often want to know what is going on inside them with their bodies. Amicus has no fondness for abortion, but he has no fondness for treating women like second-class citizens who don't deserve the truth, either.

Therefore, it is wrong—even if Petitioners have the purest intentions, which may be the case—that Petitioners want to remove the mandate that clinic visitors receive the information that the clinic is medically unlicensed or lacks licensed medical providers. Simply put, Petitioners almost seem comfortable keeping clinic visitors in the dark.

Risks being on the "dark side", this does.

In part, Petitioners complain about 48-point type, Merits Br. at 12 (citation omitted); if the Court wants to bother to prescribe a smaller typeface, it can. In any case, the presumption of severability has its uses, and the Court should leave as much as possible of the "unlicensed-clinic mandate", hopefully the whole thing; or if anything must be excised or changed, as little excising or change as possible. If 48-point type is easy to see for people with poor vision, maybe it is best to keep the type that large, so that everyone may easily know what is going on.

As the Nazarene said: "the truth will set you free." (*John* 8:32)

IV. Apposite Comparisons to *Masterpiece Cakeshop*: The Need for Institutions' Public Disclosure of *Prima Facie* Questionable Behavior

On the note of "truth", one should briefly mention the controversial "same-sex wedding cake" case, *Masterpiece Cakeshop*, *supra* at 2. That case is another case in which disclosure is important, as even those who support the baker's right to refuse service to same-sex weddings without going to jail or paying enormous fines should admit.

Indeed, it is *prima facie* outrageous for a business to deny someone service because what of some would claim is a protected-characteristic (religion, gender, orientation, etc.) issue. In context, of course, Jack Phillips' denial of service to Charlie Craig and David Mullins may not be truly outrageous: he does not deny all service to gays, but apparently just denies

marriage-related services, since he doesn't want to burn in Hell for eternity.

But because of the *prima facie* offensiveness of the idea of service-denial, it is a good idea to report the service-denial to the State, lest people be allowed to get away with service-denial, without even having to explain in detail precisely why they are daring to deny service to people in protected categories.

Further, maybe the baker, if allowed to refuse service, should be required to post publicly as much information as reasonably possible about his intention to refuse service. (If State law currently prevents such posting, maybe such law should be overruled, in part or whole.) To "sucker-punch" gay clients by not letting them know, until a private conversation with the baker, that they can't get a wedding cake, almost sounds like "dirty pool", even if that was not intended by a particular baker.

(The same would apply to a gay baker who refused to make a wedding cake for a Christian wedding.)

As well, on the note of "explanation", it may not be fascism to require the baker to explain Colorado's relevant laws to his employees. (It must be made clear that the employees do not have to endorse what the laws endorse, but, rather, they must merely understand what the laws are, and the reasons for them.) This does not mean there must be a huge fine if the baker refuses to tell his employees about the laws in detail, though.

(*See generally* Religious Hypocrisy Article, *supra* at 4, for similar but more extended discussion of *Masterpiece Cakeshop* by itself and also *vis-à-vis* the

instant case, not to mention issues of how to show fairness to both sides in "religious refusal of contraception services" cases.)

And after all the baker's explanation, to the State about his refusal to serve clients and why, to potential clients about his intention to refuse service, and to his employees about the law, Phillips or similarly-situated bakers then might be allowed to refuse service, without being arrested or paying a huge fine. This is similar to the instant case, where, under Amicus' theories, Petitioners would not have to put up information about abortion (which could abet abortion), but would at least have to tell clients about the lack of medical licensing or of licensed medical provider.

No decent person wants a "Jim Crow" situation where any class of people, by race, gender, orientation, religion, etc., gets treated as second-class citizens just for who they are. In many religion- or conscience-related cases, fortunately, there may be workable "compromises" that respect the dignity of both sides, *see* once more Religious Hypocrisy Article, *supra* at 4 (noting opportunities for principled compromise and fair accommodation to both sides). Amicus looks forward to the Court respecting the dignity of both sides in the instant case and others.

V. The State May Amend the FACT Act, or Pass New Laws, to Offer Referrals Which Nurture Fetuses Instead of Destroying Them

One way to respect both Petitioners and Respondents is not to overrule the Act facially, but to allow the mandated disclosures about medically unlicensed status, and also to allow the State to amend the Act, or pass new laws, in ways that would further shared goals of both sides. Petitioners want to save the lives of fetuses/embryos/blastocysts/ zygotes, and Respondents are not *per se* averse to that, but also want to provide clinic visitors information about abortion and contraception. So, there is some healthy overlap of goals.

Therefore, what if the State mandated the clinics to provide information without any mention of abortion or contraception, but only mentioning State (or other) programs which nurture pre-born and born infant life, and/or nurture mothers? For example, a program designed to provide adequate nutrition to pregnant mothers. Or a program aimed at the prevention of miscarriages or other disasters threatening pre-born children. Why would the clinics want to refuse such aids to the health of mothers and children?

(Actually, there are some "contraceptives", in the broad sense of the term, which even religious clinics might not be reasonably able to object to, e.g., information about various computer software or "apps" which help track women's fertility cycles, re what is popularly called the "rhythm method" for avoiding unwanted pregnancies.)

Of course, such programs would have to be accessed at a different phone number (and maybe a different address) than the one the State currently mandates, since that number could be used to

promote abortion services as well. If the State is really interested in the welfare of women and children, it could even confer with Petitioners about what kinds of programs Petitioners might recommend, or at least tolerate, the State mandating pro-life pregnancy clinics to provide information about. The truism that "People should work together instead of working against each other" may be more than a cliché in this case: it might be truly helpful to all, a sentiment appropriate to the current Rev. Dr. Martin Luther King, Jr. holiday (officially "Birthday of Martin Luther King, Jr.").

* * *

Since Amicus is finishing this brief on Martin Luther King Jr. Day, it is especially apposite to ask what MLK might think about the instant case. We cannot know for sure. (Supposedly King supported Planned Parenthood, *see, e.g.*, Larry O'Connor, *Planned Parenthood Honors Martin Luther King Jr.*, The Weekly Standard, 12:42 p.m., Jan. 16, 2017, http://www.weeklystandard.com/planned-parenthood-honors-martin-luther-king-jr./article/2006327; but that does not necessarily mean King would have supported *abortifacient* contraceptives.) Amicus suspects King might well have supported a solution like Amicus', since King was an authentic man who wanted to speak his own message courageously, instead of having his message hijacked by others; but at the same time, King was a true speaker, a man of integrity, so would likely not have objected to having to disclose relevant truth about himself (e.g., not being a licensed medical provider).

On a broader level, Dr. King might be aghast about the polarization of the Nation these days. How can people practically at each other's throats on religion, abortion, and other issues, find common ground? One way is that the Court can help out finding that common ground: not in some sappy or Kumbaya-singing way, but by looking carefully, thoughtfully, at each side's rights, duties, and dignities. In that vein, while writing largely in support of Petitioners, Amicus wishes a friendly "May the Court be with you" to both sides, Petitioners and Respondents, and he has a dream that the Court will use its intellectual and moral force to wield well the enlightening saber of justice in this case, to peaceful end as MLK might like.

CONCLUSION

The Court should overrule the court below, re mandatory abortion-service referral, but uphold the court below, as for mandated disclosure of being unlicensed as a medical facility or not having a licensed medical provider, the Court doing all the above in ways and degrees that seem reasonable; and Amicus humbly thanks the Court for its time and consideration.

January 15, 2018 Respectfully submitted,

David Boyle
Counsel of Record
P.O. Box 15143
Long Beach, CA 90815
dbo@boyleslaw.org
(734) 904-6132